

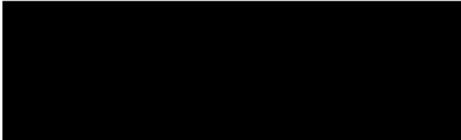
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: NOV 01 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is an enterprise with five employees engaged in the export and sale of Harley-Davidson parts as well as the repair and replacement of parts for motorcycles. It seeks to employ the beneficiary as a Foreign Business Operations Manager/Foreign Law Advisor pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On November 6, 2009, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. On appeal, the petitioner submits a U.S. Department of Labor (DOL) Form 9035 & 9035E Labor Condition Application for Nonimmigrant Workers (LCA) certified by the DOL on November 20, 2009.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on July 16, 2009 and supporting documentation with a requested employment start date of October 1, 2009; (2) the LCA certified on April 5, 2006 for employment starting October 1, 2006 and ending September 30, 2009; (3) the director's September 17, 2009 request for additional evidence (RFE); (4) the petitioner's response to the director's RFE; (5) the director's November 6, 2009 denial decision; and (5) the Form I-290B and LCA certified on November 20, 2009 in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by the United States Citizenship and Immigration Services (USCIS) on July 16, 2009.

The general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

In the instant matter, the petitioner requested an extension of the beneficiary's H-1B classification for another three years from October 1, 2009 to September 30, 2012 upon the expiration of the beneficiary's classification on September 30, 2009, but it did not submit a Form 9035E LCA in support of the extension request. On September 17, 2009, the director issued an RFE requesting *inter alia* that the petitioner submit a newly certified LCA for the period of October 1, 2009 to September 30, 2012. On October 29, 2009, the director received the response to the RFE. However, the response from the petitioner did not contain the requested LCA. On November 6, 2009, the director denied the petitioner on the ground that the petitioner failed to comply with the requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) for an LCA certified by DOL for the period of employment for which the petitioner sought to continue the beneficiary's H-1B status.

The record contains an LCA certified on April 5, 2006 for the beneficiary for the period of employment from October 1, 2006 to September 30, 2009. Based on this LCA, the petitioner's initial H-1B petition filed on behalf of the beneficiary on April 27, 2006 was approved for a period of three years. Therefore, the petitioner was required to file and obtain a new LCA for the instant petition. *See* 8 C.F.R. § 214.2(h)(4)(i)(B)(4).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO acknowledges that this office received a copy of an original LCA newly certified on November 20, 2009 on appeal. However, as referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified LCA from the DOL and the LCA must include the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner initially failed to provide a valid LCA and further in response to the director's RFE did not submit a current LCA to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Furthermore, the LCA submitted on appeal was certified more than four months after the petitioner filed the Form I-129 and more than two weeks after the petition was denied. Again, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the claimed occupational specialty. The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.